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## NOTES.

STATE AND FEDERAL POWER OVER COMMERCE UNDER THE COMMODITIES CLAUSE.—When the "Commodities Clause" was before the Circuit Court it was interpreted as providing for an absolute disassociation of the businesses of production and transportation, to be effected by prohibiting from interstate transportation by the carrier commodities which it had produced, or in which it had any interest, except such as might be necessary for its use in the conduct of its business as carrier. The recently rendered decision of the Supreme Court, *United States ex rel Att'y Gen'l v. Delaware & Hudson Co.* (1909), opinion filed May 3, interpreted the clause to this effect: (1) ownership of stock in a producing company does not give the carrier such an interest in the commodity as would bring it within the purview of the act; (2) as to carriers which own or produce commodities, the Act provides only for a disassociation from ownership at the time of transportation, the prohibition of the commodity from interstate movement to apply only in the event of the carrier's failure to comply with the condition that it part with title to the commodity before transporting it. That the regulation of commerce provided for in the second part of this interpretation is constitutional there can be but little doubt.<sup>1</sup> There can be no claim

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<sup>1</sup>New Haven R. R. v. Interstate Com. Com. (1905) 200 U. S. 361, 401.

under the V amendment that the carrier's property has been confiscated. Nor has it a constitutional right to make contracts which are opposed to what Congress determines is a proper rule for the conduct of commerce.<sup>2</sup>

The decision, however, in so far as it provides for a partial divorce of production and transportation, i. e. a disassociation from ownership at the time of transportation, suggests these questions which are squarely raised by the more drastic interpretation of the Act: (1) irrespective of the limitations in the Bill of Rights, does the power of Congress to regulate commerce include the right to deprive the carrier of its joint privilege of production and transportation created by the state? (2) Can Congress, to effect this purpose, prohibit an innocuous commodity from interstate movement?

Considering this latter question of means, it is submitted that the question is properly put in this broad form, since a denial of the right of a particular carrier to transport the coal it has mined in many instances would result practically in a denial of the right to have the coal transported at all. The most compelling reason for maintaining that the power of Congress to regulate commerce between the States does not embrace a power of prohibition is the historical reason,—that the power to regulate commerce was granted to the Federal government for the purpose of freeing it from the embarrassing restriction which had been imposed by the States, and therefore the grant could not have included a power of restriction.<sup>3</sup> This, however, may be answered by the fact that the prohibition of the "Commodities Clause" has for its ultimate object the preservation of the freedom of interstate intercourse by the elimination of discrimination in rates and preference in the furnishing of transportation facilities. Also it has been said by the Supreme Court that the extent of the commerce power is not limited by the reasons which may have caused its grant to Congress.<sup>4</sup> In favor of the general power of prohibition are the decisions which establish this power in Congress in its control of foreign commerce and commerce with the Indian tribes.<sup>5</sup> There is a divergence of opinion as to whether these decisions open the way for a similar holding in respect to interstate commerce. On one side it is urged that the power to regulate interstate commerce is granted in the same clause as the power over foreign commerce and with the Indian tribes and is co-extensive with it.<sup>6</sup> On the other hand it is said that the Federal power over interstate commerce is essentially different by reason of the reserved police powers in the States.<sup>7</sup> As yet it has been decided affirmatively, with carefully expressed limitation, only that Congress may prohibit *harmful* commodities from interstate movement.<sup>8</sup>

Adverting to the first question, the right of Congress to destroy a privilege created by a State, it is to be observed first, that the power of Congress over interstate commerce is plenary and exclusive.<sup>9</sup> The States, on the other hand by virtue of their police or general legislative power have

<sup>2</sup>8 COLUMBIA LAW REVIEW 301, 302.

<sup>3</sup>Cooke, Commerce Clause 5; 9 COLUMBIA LAW REVIEW 375, 393.

<sup>4</sup>Addyston Pipe & Steel Co. v. U. S. (1899) 175 U. S. 211, 228.

<sup>5</sup>Buttfield v. Stranahan (1903) 192 U. S. 470, 492; U. S. v. 43 Gallons of Whiskey (1876) 93 U. S. 188, 194.

<sup>6</sup>1 Mich. Law Rev. 615, 620.

<sup>7</sup>Lottery Case (1902) 188 U. S. 327, 374.

<sup>8</sup>Lottery Case, *supra*, see at 362.

<sup>9</sup>Gibbons v. Ogden (1824) 9 Wheat. 1, 196.

complete authority to pass such measures in the regulation of their internal concerns as they deem necessary for the public good and prosperity as well as for the public health and safety.<sup>10</sup> This power was never surrendered to the general government.<sup>11</sup> Under it they can properly charter a corporation with privileges designed to develop the natural resources of the State. And the Supreme Court has emphasized the necessity, in order to maintain the autonomy of the State governments, of preserving to them their police power unimpaired by unwarranted Federal encroachment under the authority of the commerce clause.<sup>12</sup> This independence from Federal authority applies, of course, only to State legislation which is directed to matters of strictly internal concern. Although the power of Congress over commerce is exclusive, the States, in pursuance of the objects stated above, may properly legislate with reference to subjects which incidentally effect interstate commerce.<sup>13</sup> For example, as in the principal case, they may authorize a corporation to produce coal and carry it in interstate transportation. But in this domain, unlike in their independent internal jurisdictions, their power is completely subordinated, and State legislation is operative only as long as it does not conflict with the valid exercise of Federal power.<sup>14</sup> So the authority of the State is no protection to a corporation against the subsequent exertion of the paramount authority of the Federal government.<sup>15</sup> But to validate this assertion of superior right Congress must act fairly within the scope of its enumerated powers. So by the "Commodities Clause" the State-created privileges of the carriers may be abrogated only if the enactment is truly a regulation of interstate commerce. That it is such a regulation is disputed.<sup>16</sup> It is urged that it is essentially a regulation of production, a subject to which the commerce power does not extend,<sup>17</sup> and is an unlawful attempt to enlarge the Federal power by indirection.<sup>18</sup> In opposition to this view it is to be maintained that, irrespective of its specific purpose, the Act is on its face, as well as in its ultimate aim, a regulation of interstate transportation, an activity surely within the commerce power. On the solution of this jurisdictional issue raised depends fundamentally the determination of the question whether Congress can lawfully abrogate the joint privilege of production and transportation established in the carrier by the legislative authority of the States.

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PATENT RIGHTS AND THE SHERMAN ANTI-TRUST ACT.—The purpose of the Sherman Anti-trust Act and similar legislation in the different states is to allow commerce to take its natural course unrestricted, and to preserve

<sup>10</sup>Lake Shore & Mich. South. Ry. v. Ohio (1898) 173 U. S. 285; U. S. v. E. C. Knight (1894) 156 U. S. 1.

<sup>11</sup>Lottery Case, *supra*, 364, 365.

<sup>12</sup>U. S. v. E. C. Knight, *supra*, at 13.

<sup>13</sup>Crandall v. Nevada (1867) 6 Wall. 35, 42; 9 COLUMBIA LAW REVIEW 375, 381. This power of a state to authorize interstate transportation has been challenged by a recent text writer, but seems generally admitted. Cooke, Commerce Clause 280.

<sup>14</sup>Northern Securities Co. v. U. S. (1903) 193 U. S. 197, 347; Lake Shore & Mich. South. Ry. v. Ohio, *supra*, 297; Gulf, Colo. etc. Ry. v. Hefley (1894) 158 U. S. 98; 9 COLUMBIA LAW REVIEW 66, 348.

<sup>15</sup>Union Bridge Co. v. U. S. (1907) 204 U. S. 364.

<sup>16</sup>P. C. Knox in 17 Yale Law Jour. 139; but cf. Address to Pittsburg Chamber of Commerce, 36 Cong. Rec. 413.

<sup>17</sup>Kidd v. Pearson (1888) 128 U. S. 1; U. S. v. E. C. Knight, *supra*.

<sup>18</sup>McCulloch v. Maryland (1819) 4 Wheat. 316, 423.